

Rules and Procedures of the Commission on Judicial Nominees Evaluation

Summary of Proposed Amendments

I. BACKGROUND

The JNE Commission is an agency of the State Bar created by Government Code section 12011.5 for the express purpose of evaluating potential candidates for judicial nomination or judicial appointment by the Governor. The language of the statute is mandatory – the Governor must submit to the JNE Commission the names of all potential appointees or nominees for judicial office so that the commission may evaluate their judicial qualifications. The statute requires that the State Bar establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office by the designated agency. The rules were last revised effective April 1, 2000. As stated above, the changes contained in this item are suggested in order to (1) give the rules greater clarity, (2) delete unnecessary and outdated provisions, (3) to conform the rules with changes in the law, and (4) have the rules conform to the current practices of the JNE Commission.

II. PROPOSED REVISIONS

A. Substantive Changes

1. Ratings -- Appellate Judges

Change to Rule I, Section 9. The proposed change clarifies the existing appellate rule for the qualified rating.

2. Clarification on Assigning Commissioners

Rule II, Section 1, has been reworded to clarify that the chair of the commission (or the staff person, in the chair's absence) is charged with assigning commissioners.

[See Exhibit 1, p. 4; Rule II, §1]

3. Record Retention

The rules used to provide that the JNE Commission records would be kept for one year. The statute of limitations is now two years. The Office of General Counsel recommends that the rules be changed to reflect the change in the statute. *[See Exhibit 1, p. 7, 14; Rule II, § 3(e); Rule III §4]*

4. Clarification on Number of Questionnaires Sent & To Whom the Questionnaires Are Sent

Rule II, section 2(c)(4), now states that if a candidate is in criminal law practice, the questionnaires will be sent to all district attorneys and public defenders up to fifty (50) in each category. It also currently states that if there are more than 50 public defenders or district attorneys, then 50 questionnaires will be sent to each group. However, Rule II, section 2(d), states that the goal of the commission is to base their report on a minimum total return of 50 questionnaires indicating knowledge. To receive 50 such questionnaires, the commission

typically sends out many more than 50 questionnaires. Therefore, it is recommended that “up to fifty” be eliminated from the first sentence of Rule II (c)(4). It is also recommended that the second sentence be revised to state that if there are more than fifty public defenders or district attorneys, then “a minimum of” fifty questionnaires will be sent.

The proposed change would also clarify that the questionnaires are sent to district attorneys and public defenders in the county where the candidate practices, not to all district attorneys and public defenders generally.

[See Exhibit 1, p. 5; Rule II, §2(c)(4)]

5. Reliance on Same Sources of Information

An addition to Rule II is proposed in order to prevent a small group from controlling the judicial appointments in any given geographic or practice area. It is suggested that a new subsection (e) be added to Rule II, as follows:

“e. Sources of Information

Whenever possible the investigating commissioners will not place continuing and exclusive reliance on the same sources of information in evaluating various candidates from any given area.”

[See Exhibit 1, p. 6; Rule II, § 2(e)]

6. Number of Commissioners Present During Interviews

Rule II, section 3(a) currently states that the commissioners should “personally interview the candidate, jointly if feasible.” The current practice of the commission is to require that commissioners be physically present. Having the commissioners physically present allows the commission to obtain a more thorough review of the candidate and helps to prevent miscommunications. Therefore, the proposed change would delete “jointly if feasible” from Rule II, section 3(a). In addition, for the reasons listed above, a new section (b) is proposed; the proposed new section would state that:

“In the case of trial court, each candidate shall be interviewed in person by not less than two commissioners at least one of whom is an attorney. For appellate candidates, at least three commissioners shall be present at the interview and at least one shall be a public member. Interviews shall not be conducted via telephone absent unusual circumstances, and with the chair’s permission.”

[See Exhibit 1, p. 6; Rule II, §§2(a)-(b)]

7. Disclosure of Adverse Allegations to Candidate, Corroboration of Negative Comments

An addition to Rule II, section 3(c) is proposed in order to conform the rule to current commission practice. Rule II, section 3(c) deals with the disclosure of adverse allegations to the candidate. The current practice, in order to avoid passing on mere rumors, is not to disclose an adverse allegation by a rater unless a third party can corroborate the allegation. Accordingly, it is proposed that a sentence to that effect be added to the end of section 3(c). The proposed

change would add the following sentence:

“...The adverse allegations that are taken from the confidential comment forms must be corroborated by a third party prior to disclosure to the candidate.”

[See Exhibit 1, p. 6; Rule II, § 3(c)]

8. Tape Recording

The current Rule II, section 3(e), requires that the interview be taped. JNE practice, conforming to California law, is to ask for the candidate's consent to the taping. Although no candidate has ever withheld that consent, the commission has no guidance were permission to tape withheld. The proposed amendment provides that if the candidate does not consent to the taping of the interview - thereby depriving the review panel of the record of the interview - no review would be allowed.

[See Exhibit 1, p. 7; Rule II, §3(e)]

9. Required Report Information

Rule II, section 4, sets forth what information must be contained in reports to the commission. The current rule gives discretion to the individual commissioner, but requires that each report contain the number of questionnaires mailed and the numerical breakdown of the responses and the ratings. The proposed change would add a requirement that the report also include “a summary of the substantial and credible information received and the recommended rating.” This change is proposed because a rating of “not qualified” may only be given on the basis of substantial and credible information received in the investigation. When granting review, the review committee looks to see whether the information received was substantial and credible. Adding the requirement that this information be contained in the report will aid the review committee in its determinations. This change also conforms to current JNE practice.

[See Exhibit 1, p. 7-8; Rule II, §4]

10. Determination of Whether to Reinvestigate Resubmitted Candidates

The proposed change would give the chair, rather than the whole commission, the power to determine whether a candidate should be reinvestigated. The rules currently provide that the commission will make the determination of whether or not to reinvestigate a candidate whose name is resubmitted by the Governor. Rule II, section 7, states that if a candidate has not been evaluated in the past twelve months, then the candidate should be reinvestigated. However, if the commission has recently evaluated a candidate, Rule II, section 7, provides guidelines for the commission to determine whether to investigate further or whether to rely on the previous investigation. The proposed change would keep the guidelines, but as stated above, the decision would be that of the chair, rather than the commission. This change is proposed because having the chair make the decision is more efficient and allows action to be taken on these items in a more timely manner. Having to take the matters to the commission means that getting a decision can take six months or more. *[See Exhibit I, p. 8-9; Rule II, §7]*

11. Deletion of Summary Evaluation Provision Regarding Municipal Court Judges

The proposed change would delete Rule II, section 7(b), which provided for a summary evaluation if the Governor submitted a candidate for municipal court after submitting the name for a position on the superior court. This change is proposed because this subsection is now obsolete due to the consolidation of municipal and superior courts. [*See Exhibit I, p. 9; Rule II, §8(b)*]

12. Elimination of Percentage Breakdown in Report to the Governor

Rule II, section 9, provides that the commission will give the Governor a report along with its opinion on a candidate's qualifications. Under the current rule, the report is to include the names of the investigating commissioners; the numerical count of the commission's vote except when the finding of the commission is that the candidate is "not qualified;" the number of confidential questionnaires returned; and a percentage breakdown of the responses. Because of concerns over confidentiality, it is proposed that the rule be revised so that the report does not have to contain a percentage breakdown of the responses.

The statute creating the JNE Commission mandates strict confidentiality. According to Government Code section 12011.5(e), "No provision of this section shall be construed as requiring that any rule or procedure be adopted which permits the disclosure to the candidate of information from which the candidate may infer the source, and no information shall either be disclosed to the candidate nor be obtainable by any process which would jeopardize the confidentiality of communications from persons whose opinion has been sought on the candidate's qualifications."

The percentage breakdown reporting requirement should be eliminated for two reasons; a percentage breakdown of the responses could violate confidentiality and could also be misleading to the Governor's office. A candidate could have 50 evaluations rating him/her as "well qualified." However, that same candidate could receive one evaluation of "not qualified," based on that rater's information regarding the candidate (which information was not known to the other raters). If a sufficiently serious allegation, found to be true by the commission, is contained within that individual's form, it could potentially be enough for the commission to give a candidate a not-qualified rating, even if the other 50 raters viewed the candidate as well qualified. A report to the Governor showing a 50-1 response ratio would be misleading. Moreover, if this percentage breakdown is subsequently revealed to the candidate, the confidentiality of the rater could be compromised because the candidate would know that the rater was the only person who could have provided the information. [*See Exhibit I, p. 10; Rule II, §9(a)*]

13. Confidentiality of Commission Activity

Four changes are proposed to Rule III, section 2.

- a. First, in order to ensure absolute confidentiality, it is proposed that language be added to Rule III, section 2(a), in order to clarify what communications individual commissioners may make. Investigations are absolutely confidential, although

Board members can review the files of the commission at the offices of the State Bar. The proposed changes would add the following language to the end of the first paragraph: “However, individual commission members may provide information to members of the Board of Governors with the authorization of the chair.” This would limit the release of information to persons outside of the commission.

- b. The second change proposed relates to copying of materials connected to the commission. Rule III, section 2(a), states that “No copy or duplicate of writing connected with the activities of the commission shall be distributed to the Board of Governors, except a copy of the letter received from the Governor containing the names of persons to be evaluated.” It is suggested that the exception for the list of names be eliminated, in order to conform with current JNE commission practice, upon recommendation of a special committee in 1997, and to control the information released in order to maintain confidentiality.
- c. The third change proposes deletion of outdated language, which no longer is a valid reference.
- d. The fourth change clarifies which board designees can receive confidential information and deletes a redundant reference to Business and Professions Code section 6044.

[See Exhibit 1, p. 12-13; Rule III, §2(a)]

B. Non-substantive Changes

1. Consistent Use of “Candidate”

The rules currently use “nominee” and “candidate” interchangeably. For consistency, all instances of “nominee” have been changed to “candidate.” Government Code section 12011.5, the statute establishing the JNE Commission, uses “candidate” and “nominee,” but “nominee” is used generally to describe someone who the JNE Commission has rated as qualified. Therefore, the rules have been revised to use one word (“candidate”) so as to eliminate the possibility of confusion resulting from using two words.

2. Miscellaneous Changes are shown in legislative style, with the additions double underlined and the deletions shown with a ~~striketrough~~. Changes have been made to:

- a. New Rule I, Definitions, sections 1-9 were moved and renumbered or added. Sections 9 and 10 include the rating definitions for appellate and trial courts, respectively. Definitions of the ratings were modified. [For definitions see rule I, §1 Not Voting Due to Absence from Meeting Room; §2 Abstaining; §3 Commission Activity; §4 Confidential Comment Form; §5 Disciplinary Complaint; §6 Personal Data Questionnaire; §7 Personal Interview; §8 Special Committee; §9 Ratings – Appellate Judges; §10 Ratings – Trial Judges]

- b. Several revisions are suggested to improve the readability of the Rules. For instance, in Rule I, Section 10, it is suggested that the phrase “the candidate is deemed ~~to be fitted~~ to perform the judicial function with distinction” be changed to “the candidate is deemed fit to perform the judicial function with distinction.”
- c. Rule II, §1 [Attachment 1, p. 4]
 [“... one ~~of said~~ commissioners” changed to “one assigned commissioner”]
 [“~~higher~~ courts” changed to “appellate courts”]
 [“~~prior to the commencement of the investigation~~” changed to “prior to the investigation’s commencement.”]
 [“the candidates ~~shall be notified~~ of the ~~pendency of the~~ investigation” changed to “the lead commissioner shall notify the candidates of the pending investigation.”]
- d. Rule II, §2(a) [Attachment 1, p. 4-5]
 [“...qualifications ~~of the candidate...~~” changed to “...candidate’s qualifications...”;
 shall request ~~of~~ the candidate provide]
- e. Rule II, §2(b) [Attachment 1, p 5]
 [“...qualifications ~~of the candidate...~~” changed to “...candidate’s qualifications...”;
~~such the investigating~~ commissioner’s file for a period of at least ~~one~~ three years...
- f. Rule II, §2(d) [Attachment 1, p. 5]
 “The goal of the commission shall be ~~that reports will be based~~ to base reports on a minimum total return of fifty...”
- g. Rule II, §6 [Attachment 1, p. 8] renumbered from old Rule I, section 3. Re-titled to Qualities/Factors For Consideration In Evaluating Candidates.